IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff, ORDER

v. 13-cr-66-wmc

TYNOICE R. BAKER,

Defendant.

For the second time, defendant Tynoice Baker has filed a motion for modification of the sentence under 18 U.S.C. § 3582(c)(2). (Dkt. #80.) Defendant pled guilty and was sentenced on December 10, 2014, to use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). (Dkt. #68.) Because there has not been a change in the sentencing guidelines applicable to § 924(c)(1), however, she is not entitled to resentencing under § 3582(c)(2).

Baker may now actually be seeking resentencing under 28 U.S.C. § 2255 because her motion cites the United States Supreme Court's recent holding in *United States v. Johnson*, 135 S. Ct. 2551 (2015). In *Johnson,* the Court held that the residual clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), violates the due process clause of the Fifth Amendment. Unfortunately, this relief is also unavailable to her.[1]

OPINION

[1] Ms. Baker also alludes to her continued good behavior, programming and work history, all of which the court again commends. Although the court has no statutory authority to modify Baker's sentence on this basis, hopefully it will lead to an earlier prerelease placement in an appropriate residential reentry center as contemplated in this court's original sentence, and ultimately, in her successful reintegration into society, both for Ms. Baker and her children.

Under § 924(e), a defendant is subject to a significantly greater sentence if the court finds that, among other things, the defendant has three prior felonies for either a violent felony or serious drug offense. A "violent felony" is defined as a crime that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

§ 924(e)(2)(B) (emphasis added). In *Johnson*, the Supreme Court found the italicized language in subsection (ii), the so-called "residual clause," too vague to satisfy due process guaranteed by the United States Constitution. The Court of Appeals for the Seventh Circuit has since held that *Johnson* applies retroactively. *See Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) ("There is no escaping the logical conclusion that the Court itself made *Johnson* categorically retroactive to cases on collateral review.").

While Baker claims that her sentence is "identical to the *Johnson* judgment," it did not arise from § 924(e)(2)(B). Rather, she was sentenced under § 924(c)(1), which neither implicates § 924(e)(2)(B) nor involves consideration of prior crimes. Instead, under § 924(c)(1), a mandatory minimum sentence applies to "any person who, during and in relation to any crime of violence or drug trafficking crime" uses or carries a firearm. Unlike the definition of a "violent felony," considered by the Court in *Johnson* and the Seventh Circuit in *Price*, a "crime of violence" is defined as a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force

> against the person or property of another may be used in the course of committing the offense.

§ 924(c)(3). As previously noted, the only language the Supreme Court held to be unconstitutional in *Johnson* is the residential clause language of subsection § 924(e)(2)(B)(ii), which is not present in § 924(c)(3).

Accordingly, the holdings in *Johnson* and *Price* do not change Baker's sentence, and her motion would be denied even if it were construed as brought under § 2255.[2] No doubt of small comfort to Baker now, but *had* she been sentenced as a "career criminal," her *minimum* sentence would likely have been fifteen years in prison.[3]

ORDER

IT IS ORDERED that Defendant Tynoice Baker's Motion for Modification of Sentence (dkt. #80) is DENIED.

Entered this 16th day of November, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[2] Since Baker brought this motion under § 2255, the court's opinion will not count as a collateral attack of her sentence. *See Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004) ("unless the district judge has warned the prisoner that a motion will be treated as a collateral attack, and offered the opportunity to withdraw it . . . the motion does not count as the one collateral attack allowed to each prisoner"). Of course, a motion under § 2255 *would* count.

[3] Had the provisions of 18 U.S.C. § 924(e)(2) applied, the mandatory minimum penalty is fifteen years in prison, and the maximum penalty would have been life in prison.